No. 89-260

In The

Supreme Court of the United States

October Term, 1989

THE STATE OF IDAHO,

Petitioner,

vs.

LAURA LEE WRIGHT,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Idaho

BRIEF FOR PETITIONER

JAMES T. JONES
Attorney General of the State of Idaho

JOHN J. McMAHON
Chief Deputy
Attorney General

*MYRNA A. I. STAHMAN
Deputy Attorney General
Statehouse, Room 210
Boise, Idaho 83720
Telephone: (208) 334-2400

Counsel for Petitioner

*Counsel of Record

QUESTION PRESENTED

Whether the "particularized guarantees of trustworthiness" mandated by the Sixth Amendment Confrontation Clause of the United States Constitution require that the hearsay statement of a very young victim of sexual abuse to an examining pediatrician be excluded unless the prosecution establishes that (a) the interview was either audio or videotaped; (b) leading questions were not used; and (3) the examining pediatrician conducting the interview did not have any preconceived idea of what the child should be disclosing.

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OPINION BELOW

The opinion of the Idaho Supreme Court is reported as *State v. Wright*, 116 Idaho 382, 775 P.2d 1224 (1989).

The opinion of the Idaho Supreme Court in the companion case is reported as *State v. Giles*, 115 Idaho 984, 772 P.2d 191 (1989).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). The judgment below is not based on an independent and adequate state ground. The Idaho Supreme Court relied entirely upon the Confrontation Clause of the Sixth Amendment to the United States Constitution in excluding the out-of-court statements of the child sexual abuse victim who was unavailable to testify at trial. Idaho does not have a state constitutional confrontation clause.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES OF EVIDENCE INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . .

Idaho Code § 19-3024 provides:

> 19-3024. Statements by child. – Statements made by a child under the age of ten (10) years describing any act of sexual abuse, physical

abuse or other criminal conduct committed with or upon the child, although not otherwise admissible by statute or court rule, are admissible in evidence after a proper foundation has been laid in accordance with the Idaho rules of evidence in any proceedings under the child protective act, chapter 16, title 16, Idaho Code, or in any criminal proceedings in the courts of the state of Idaho if:

1. The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statements provide sufficient indicia of reliability; and

2. The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness. A child is unavailable as a witness when the child is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity. Provided that when the child is unavailable as a witness, such statements may be admitted only if there is corroborative evidence of the act.

Statements may not be admitted unless the proponent of the statements notifies the adverse party of his intention to offer the statements and the particulars of the statements sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statements.

Rule 803, Idaho Rules of Evidence, provides:

Rule 803. **Hearsay exceptions; availability of declarant immaterial.** – The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

. . . .

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

STATEMENT OF THE CASE

Laura Lee Wright was convicted of two counts of lewd conduct with a minor. The victim of Count II, referred to throughout this brief as the younger daughter, was the two-and-one-half-year-old daughter of Wright and her codefendant Robert L. Giles. The victim of Count I, referred to throughout this brief as the older daughter, was the five-and-one-half-year-old daughter of Wright and her husband Louis Wright, from whom she was separated at all times relevant to this case. At the time the sexual abuse was reported the older daughter was living with her father, Louis Wright, and his girlfriend, pursuant to an informal joint custody agreement. Tr. p.490. In early October 1986, Louis went to the home of Laura Lee

Wright and Robert Giles to take custody of the older daughter. When Laura refused to give him physical custody of the older daughter, Louis took her for ice cream and did not return her to Laura.

On Saturday afternoon, November 8, 1986, the older daughter took her bath with the help of her father's girlfriend, Cynthia Goodman. Tr. p.489. They spoke of a number of things, including the older daughter's difficulties with bed wetting. Cynthia testified:

> [S]he said that "When mommy and daddy Bobby are done" and just her little eyes flew open, and she just stopped just real sudden. Just didn't – kind of like she had been electrocuted. She had just stopped, and from looking at her, you know, at her face I asked her what was wrong, you know, she could tell me, and she could trust me, you know. And she just stood there for a little bit and then she just started crying and told me what Bobby [Giles] had done and what Laura [Wright] had done.
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Tr. p.456, L.19 – p.457, L.14.

The following day, Goodman and Louis Wright reported the sexual abuse to the police and took the older

daughter to the hospital. Tr. pp.461-462. The initial examination was done by Dr. Johnson, a doctor with no experience in child sexual abuse detection. He called in Dr. Bayer, his faculty backup, and Dr. Jambura, a pediatrician with extensive experience in handling child abuse cases. Tr. pp.508-509. This examination revealed that the older daughter's upper leg had a fairly large bruise, the labia minora were slightly fused inferiorly, a slight abrasion existed next to the labia minora on the right inferior region, and the hymenal ring was absent and rather than being fairly rough and unmarked was completely smooth. Dr. Bayer testified that this was a sign of chronic abuse. Tr. pp.352-353. Dr. Jambura testified that it was "highly possible that vaginal penetration had been occurring on a relatively regular basis." J.A.100.

After the medical examination, the older daughter, her father Louis Wright, and his girlfriend Cynthia Goodman met with Larry Armstrong, a Boise City police detective who holds a counseling license and a master's degree in education. The older daughter told Detective Armstrong that her little sister had also been hurt by Mom [Laura Wright] and Bobby [Giles] and they would do the same things to her little sister that they did to her. Tr. p.33. Detective Armstrong then went to the home of Laura Wright and Robert Giles and took the two-and-one-half-year-old biological daughter of Laura Wright and Robert Giles into protective custody. Tr. pp.337-338.

The following day, November 10, 1986, the younger daughter was taken to Dr. Jambura for a physical examination. This examination revealed some redness and bruises in the early stage of healing on the inner surface

of the labia majora and the labia minora, and some scarring in the back portion of the vagina. J.A.105. Dr. Jambura explained that it is very difficult to bruise the labia minora, and the bruising on the inner surfaces of both labia suggested that forceful contact had been with the inner genital area. J.A.105-106. Dr. Jambura believed that the trauma occurred approximately two to three days prior to his examination of the younger daughter, but because of the acute injuries he could not ascertain whether chronic abuse had been occurring. J.A.106-107.

After doing a complete physical examination on the younger daughter, Dr. Jambura visited with her. He began with a few minutes of "chitchat" and she started to carry on a very relaxed, animated conversation. Dr. Jambura moved gently into the domestic situation with questions such as how things are at home and then asked four specific questions. When Dr. Jambura asked her, "Do you play with daddy?" she made a comment about yes we play a lot, expanded on that, and talked about spending time with daddy. In response to Dr. Jambura's question, "Does daddy play with you?" she responded that they played together in a variety of circumstances, and she seemed very unaffected by the question. Dr. Jambura then asked her, "Does daddy touch you with his pee-pee?" To aid in answering his question Dr. Jambura drew a picture, to which she added a penis. J.A.117. She then answered the question in the affirmative. When Dr. Jambura asked her, "Do you touch his pee-pee?" she was silent. After allowing some silence, she told Dr. Jambura that "Daddy does do this with me, but he does it a lot more with my sister than with me." J.A.121-123.

Laura Lee Wright and Robert Giles were each charged with the sexual abuse of both young girls. Prior to trial the state filed a motion in limine for rulings on the admissibility of a number of hearsay statements made by both girls. The state based its motion on Idaho Code §19-3024, the Idaho statutory hearsay exception for victims of sexual abuse, physical abuse or other criminal conduct committed upon a child witness. J.A.4-8. The court reserved its ruling until trial. At the hearing on the state's motion, the court made it clear that Idaho Rule of Evidence 803(24)[1] would be considered in addition to Idaho Code § 19-3024 as to the admissibility of the hearsay statements of both young girls. The prosecutor argued that the younger daughter's statements to Dr. Jambura were also admissible pursuant to Rules 803(4) and (24). J.A.21. The court reserved its ruling on the admissibility of the numerous hearsay statements until each was ready to be presented by the state. J.A.30.

Before the state presented its first witness, a hearing was held to determine whether the younger daughter, who had turned three just one month prior to the trial, Tr. p.550, Ls.20-23, and the older daughter, who had turned six just one month prior to the trial, Tr. p.197, Ls.7-15, were capable of testifying. J.A.32-40. After the judge questioned the younger daughter, he determined that she was "not capable of communicating to the jury." Both the prosecutor and defense counsel agreed. J.A.38-39. After questioning the older daughter, the court held that

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she was "able to perceive, recollect and relate truthfully perceptions; that it is up to the jury to weigh the evidence, and she may testify." Tr. p.204, Ls.8-11.

Although the older daughter had difficulty testifying, she was able to testify about the sexual abuse of her younger sister committed by Robert Giles and Laura Wright. J.A.48-55; 61-62; 67; 78-79.

> Q. And do you remember telling – well, do you remember what you saw the private touching with Bobby and Laura and [your younger sister], what would Laura be doing?
>
> A. She would be holding [my younger sister's] leg and holding her mouth so she wouldn't scream.

J.A.61.

Prior to Dr. Jambura's testifying as to the younger daughter's statements to him, a hearing was held outside the presence of the jury. Counsel for Wright and Giles asserted that, because the younger daughter was not capable of testifying, her statements to the doctor should not be admitted and that admission of the statements would violate his clients' constitutional right to confront witnesses. The prosecutor argued that the statements of the younger daughter to Dr. Jambura were admissible under Rule 803(4), the medical exception. He had previously argued the admissibility under Idaho Code § 19-3024. The district judge explained that his finding that the younger daughter was not capable of communicating to the jury did not prevent the admission of her out-of-court statements "if they meet the reliability test." J.A.115. The judge explained that (1) there was physical

evidence to corroborate that sexual abuse occurred; (2) the statements of the younger daughter to Dr. Jambura were not the type of statements that such a young child would make up; and (3) the younger daughter's identification of her daddy as the person who sexually abused her was reliable because (a) the injuries occurred at the time she was in the custody of her mother and father, the two defendants, and (b) her older sister in her testimony had previously identified Laura Wright and Bobby Giles as the perpetrators of the sexual abuse. J.A.115. The trial court permitted Dr. Jambura to testify as to the statements the younger daughter made to him during his examination of her, pursuant to Rule 803(24). J.A.119.

Police officer Larry Armstrong, Tr. p.333, Ls.15-24; examining physician Dr. Johnson, Tr. p.511, Ls.21-25; psychologist Dr. Eisenbeis, Tr. p.419, Ls.1-8; and Cynthia Goodman, Tr. p.406, Ls.14-20, each testified that the older daughter had told him or her of the sexual acts Wright and Giles did with her and that she had seen them do the same thing with her little sister. A defense witness testified that the older daughter had falsely accused him of sexually abusing her. Tr. pp.638-640. The defendant, Laura Lee Wright, testified that the older daughter had told her of sexual molestation incidents at the hands of Cynthia Goodman's boys. Tr. p.525, L.21 – p.526, L.3.

Both Laura Lee Wright and Robert Giles were convicted of sexually abusing both young girls. Each appealed from the conviction for sexually abusing the younger daughter, but neither appealed from the conviction for sexually abusing the older daughter. Counsel for Wright claimed only that the admission of Dr. Jambura's testimony as to the younger daughter's statements made

during his examination of her violated Wright's Sixth Amendment right to confront witnesses against her. Counsel for Giles did not raise this constitutional claim; rather he based his appeal entirely on the Idaho Rules of Evidence, asserting they were violated by the admission of Dr. Jambura's testimony concerning those same statements of the younger daughter.

The Idaho Supreme Court first decided Giles' appeal, holding that Dr. Jambura's testimony was properly admitted under Rule 803(24). The court held that the statements of the younger daughter to Dr. Jambura had sufficient indicia of reliability and circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions. *State v. Giles*, 115 Idaho 984, 772 P.2d 191 (1989), appendix to the petition, A.23. Subsequently, a three member majority of the Idaho Supreme Court held that, although Dr. Jambura's testimony was properly admitted under Rule 803(24), its admission was "in violation of the standards applicable to the Confrontation Clause of the United States Constitution." *State v. Wright*, 116 Idaho 382, 383, 775 P.2d 1225, 1226 (1989), appendix to the petition, A.1. The court explained that the younger daughter's statements to Dr. Jambura lacked the particularized guarantees of trustworthiness necessary to satisfy the Confrontation Clause because (1) the interview was not videotaped, (2) Dr. Jambura asked leading questions, and (3) he had a preconceived idea of what the younger daughter would be disclosing.

SUMMARY OF ARGUMENT

This Court has never interpreted the literal wording of the Confrontation Clause so as to exclude reliable out-of-court statements of unavailable declarants. On the contrary, this Court recognizes that the truth-seeking function of the Sixth Amendment is furthered when reliable out-of-court statements of unavailable witnesses are admitted into evidence.

Hearsay statements are admitted as exceptions to the face-to-face requirement of the Confrontation Clause when public policy or the necessities of the case so require. Public policy and "the rule of necessity" demand that reliable out-of-court statements of child sex abuse victims who are unavailable at trial be admitted into evidence.

This Court should rule that a totality of the circumstances test – similar to that used for purposes of the residual hearsay exception of Rule 803(24) and of many recently enacted statutes and rules providing a child sexual abuse victim hearsay exceptions – should be used to determine "indicia of reliability" under the Confrontation Clause.

The Idaho Supreme Court erred in creating three inflexible conditions precedent for admission of child sexual abuse victims' hearsay statements.

ARGUMENT

I.

THE CONFRONTATION CLAUSE HAS NEVER BEEN INTERPRETED TO EXCLUDE THE ADMISSION OF RELIABLE OUT-OF-COURT STATEMENTS OF UNAVAILABLE WITNESSES

The Idaho Supreme Court overturned the conviction of Laura Lee Wright for sexual abuse of her two-and-one-half-year-old daughter because the hearsay statements of the youngster to her pediatrician were not videotaped and because they were elicited by leading questions from an interviewer who had a preconceived idea of the likely answers. The Idaho court purported to ground its decision on this Court's recent cases dealing with the Confrontation Clause.

> The purpose of confrontation between an accuser and defendant is that it "undoubtedly makes it more difficult to lie against someone, particularly if that person is an accused and is present at trial." *Ohio v. Roberts*, 448 U.S. 56, 63, n. 6, 100 S.Ct. 2531, 2538, n. 6, 65 L.Ed.2d 597 (1980). Only last year, the United States Supreme Court found that the sexual assault defendant's right to face-to-face confrontation was violated by permitting two 13-year-old girls to testify behind a large screen that enabled Coy to dimly perceive the witnesses but rendered them unable to see him. *Coy v. Iowa*, ___ U.S. ___, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).

State v. Wright, 116 Idaho at 384, 775 P.2d at 1226. Neither a literal nor a functional reading of the Confrontation Clause offers any support for the Idaho court's ruling

that out-of-court statements of an unavailable child sexual abuse victim – which statements are found to be reliable under the residual hearsay exception, Rule 803(24) – are inadmissible unless they meet three novel litmus tests of the Idaho court's own devising.

A. The Literal Wording of the Confrontation Clause Does Not Exclude Reliable Hearsay of Unavailable Witnesses

In *Coy v. Iowa*, 108 S.Ct. 2798 (1988), this Court recently reaffirmed the "literal right to 'confront' the witness at the time of trial" as forming "the core of the values furthered by the Confrontation Clause." *Id.* at 2801 (quoting *California v. Green*, 399 U.S. 149, 157 (1970)). The Court was unsympathetic to the state's argument that "the confrontation interest at stake here was outweighed by the necessity of protecting victims of sexual abuse." *Id.* at 2802. Indeed, for the *Coy* majority, the fact that face-to-face confrontation with the defendant may inflict trauma on the abused child simply illustrates the "truism that constitutional protections have costs." *Id.*

Thus, there is language in *Coy* that may have led the Idaho court to conclude that when the rights of a child victim of sexual abuse conflict with those of a criminal defendant, the Confrontation Clause of the Sixth Amendment to the United States Constitution gives the nod to the latter. But it is a quantum leap from *Coy's* reaffirmation of "the irreducible literal meaning of the clause: 'a right to *meet face to face* all those who appear and give evidence *at trial*,' " *Id.* at 2803 (quoting Harlan, J., concurrence in *California v. Green*, 399 U.S. at 175) (emphasis

held that the dying declaration of a murder victim was properly admitted "upon the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood, and enforce as strict adherence to the truth as the obligation of an oath could impose." *Id.* at 152. Thus, the out-of-court statement of the dying victim was admitted at trial because it met the dual tests of necessity and reliability.

Upon appeal from Mattox's retrial, the Court recognized yet another hearsay exception and upheld the admissibility of testimony of two witnesses from the first trial who had died prior to Mattox's second trial.

> But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to *considerations of public policy and the necessities of the case.* To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

156 U.S. at 243 (emphasis added).

All three opinions of this Court in *Coy v. Iowa* reaffirm the principle that reliable hearsay of an unavailable declarant is admissible when required by "considerations of public policy and the necessities of the case."

The majority opinion in *Coy* noted that prior Court opinions had held – with regard to "the right to exclude

out-of-court statements" – that the "rights conferred by the Confrontation Clause are not absolute and may give way to other important interests." 108 S.Ct. at 2802. This is particularly true with regard to "the right to exclude out-of-court statements." *Id.* (referring to *Ohio v. Roberts*, 448 U.S. 56 (1980)). Similarly, the majority, in a lengthy discussion of Wigmore's views on the Confrontation Clause, referred approvingly to the "sensible and traditional exceptions to the hearsay rule . . . ." *Id.* at 2801-02, n. 2. Finally, though the majority would approve of additional exceptions to the face-to-face requirement of the Confrontation Clause sparingly, it conceded that such exceptions were possible "when necessary to further an important public policy." *Id.* at 2803.

Justice O'Connor's concurrence rejected outright any suggestion that a defendant has an absolute " 'right physically to face those who testify against him,' *ibid.*, even if located at the 'core' of the Confrontation Clause . . . ." *Id.* at 2804 (citing *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)). Instead, the Confrontation Clause only " 'reflects a *preference* for face-to-face confrontation at trial,' " which preference "may be overcome in a particular case if close examination of 'competing interests' so warrants." *Id.* (quoting *Ohio v. Roberts*, 448 U.S. at 63-64) (emphasis in original). In particular, the concurring opinion noted that:

> [v]irtually all of our cases approving the use of hearsay evidence have implicated the literal right to "confront" that has always been recognized as forming "the core of the values furthered by the Confrontation Clause," *California v. Green*, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934-1935, 26 L.Ed.2d 489 (1970), and yet have

abuse or other criminal conduct committed with or upon the child, although not otherwise admissible by statute or court rule, are admissible in evidence after a proper foundation has been laid in accordance with the Idaho rules of evidence in any proceedings under the child protective act, chapter 16, title 16, Idaho Code, or in any criminal proceedings in the courts of the state of Idaho if:

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[1] Unless otherwise noted, the Idaho Rules of Evidence (hereinafter cited as "Rule") are identical to the Federal Rules of Evidence.

she was "able to perceive, recollect and relate truthfully perceptions; that it is up to the jury to weigh the evidence, and she may testify." Tr. p.204, Ls.8-11.

Although the older daughter had difficulty testifying, she was able to testify about the sexual abuse of her younger sister committed by Robert Giles and Laura Wright. J.A.48-55; 61-62; 67; 78-79.

> Q. And do you remember telling – well, do you remember what you saw the private touching with Bobby and Laura and [your younger sister], what would Laura be doing?
>
> A. She would be holding [my younger sister's] leg and holding her mouth so she wouldn't scream.

J.A.61.

Prior to Dr. Jambura's testifying as to the younger daughter's statements to him, a hearing was held outside the presence of the jury. Counsel for Wright and Giles asserted that, because the younger daughter was not capable of testifying, her statements to the doctor should not be admitted and that admission of the statements would violate his clients' constitutional right to confront witnesses. The prosecutor argued that the statements of the younger daughter to Dr. Jambura were admissible under Rule 803(4), the medical exception. He had previously argued the admissibility under Idaho Code § 19-3024. The district judge explained that his finding that the younger daughter was not capable of communicating to the jury did not prevent the admission of her out-of-court statements "if they meet the reliability test." J.A.115. The judge explained that (1) there was physical

evidence to corroborate that sexual abuse occurred; (2) the statements of the younger daughter to Dr. Jambura were not the type of statements that such a young child would make up; and (3) the younger daughter's identification of her daddy as the person who sexually abused her was reliable because (a) the injuries occurred at the time she was in the custody of her mother and father, the two defendants, and (b) her older sister in her testimony had previously identified Laura Wright and Bobby Giles as the perpetrators of the sexual abuse. J.A.115. The trial court permitted Dr. Jambura to testify as to the statements the younger daughter made to him during his examination of her, pursuant to Rule 803(24). J.A.119.

Police officer Larry Armstrong, Tr. p.333, Ls.15-24; examining physician Dr. Johnson, Tr. p.511, Ls.21-25; psychologist Dr. Eisenbeis, Tr. p.419, Ls.1-8; and Cynthia Goodman, Tr. p.406, Ls.14-20, each testified that the older daughter had told him or her of the sexual acts Wright and Giles did with her and that she had seen them do the same thing with her little sister. A defense witness testified that the older daughter had falsely accused him of sexually abusing her. Tr. pp.638-640. The defendant, Laura Lee Wright, testified that the older daughter had told her of sexual molestation incidents at the hands of Cynthia Goodman's boys. Tr. p.525, L.21 – p.526, L.3.

Both Laura Lee Wright and Robert Giles were convicted of sexually abusing both young girls. Each appealed from the conviction for sexually abusing the younger daughter, but neither appealed from the conviction for sexually abusing the older daughter. Counsel for Wright claimed only that the admission of Dr. Jambura's testimony as to the younger daughter's statements made

during his examination of her violated Wright's Sixth Amendment right to confront witnesses against her. Counsel for Giles did not raise this constitutional claim; rather he based his appeal entirely on the Idaho Rules of Evidence, asserting they were violated by the admission of Dr. Jambura's testimony concerning those same statements of the younger daughter.

The Idaho Supreme Court first decided Giles' appeal, holding that Dr. Jambura's testimony was properly admitted under Rule 803(24). The court held that the statements of the younger daughter to Dr. Jambura had sufficient indicia of reliability and circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions. *State v. Giles*, 115 Idaho 984, 772 P.2d 191 (1989), appendix to the petition, A.23. Subsequently, a three member majority of the Idaho Supreme Court held that, although Dr. Jambura's testimony was properly admitted under Rule 803(24), its admission was "in violation of the standards applicable to the Confrontation Clause of the United States Constitution." *State v. Wright*, 116 Idaho 382, 383, 775 P.2d 1225, 1226 (1989), appendix to the petition, A.1. The court explained that the younger daughter's statements to Dr. Jambura lacked the particularized guarantees of trustworthiness necessary to satisfy the Confrontation Clause because (1) the interview was not videotaped, (2) Dr. Jambura asked leading questions, and (3) he had a preconceived idea of what the younger daughter would be disclosing.

SUMMARY OF ARGUMENT

This Court has never interpreted the literal wording of the Confrontation Clause so as to exclude reliable out-of-court statements of unavailable declarants. On the contrary, this Court recognizes that the truth-seeking function of the Sixth Amendment is furthered when reliable out-of-court statements of unavailable witnesses are admitted into evidence.

Hearsay statements are admitted as exceptions to the face-to-face requirement of the Confrontation Clause when public policy or the necessities of the case so require. Public policy and "the rule of necessity" demand that reliable out-of-court statements of child sex abuse victims who are unavailable at trial be admitted into evidence.

This Court should rule that a totality of the circumstances test – similar to that used for purposes of the residual hearsay exception of Rule 803(24) and of many recently enacted statutes and rules providing a child sexual abuse victim hearsay exceptions – should be used to determine "indicia of reliability" under the Confrontation Clause.

The Idaho Supreme Court erred in creating three inflexible conditions precedent for admission of child sexual abuse victims' hearsay statements.

ARGUMENT

I.

THE CONFRONTATION CLAUSE HAS NEVER BEEN INTERPRETED TO EXCLUDE THE ADMISSION OF RELIABLE OUT-OF-COURT STATEMENTS OF UNAVAILABLE WITNESSES

The Idaho Supreme Court overturned the conviction of Laura Lee Wright for sexual abuse of her two-and-one-half-year-old daughter because the hearsay statements of the youngster to her pediatrician were not videotaped and because they were elicited by leading questions from an interviewer who had a preconceived idea of the likely answers. The Idaho court purported to ground its decision on this Court's recent cases dealing with the Confrontation Clause.

> The purpose of confrontation between an accuser and defendant is that it "undoubtedly makes it more difficult to lie against someone, particularly if that person is an accused and is present at trial." *Ohio v. Roberts*, 448 U.S. 56, 63, n. 6, 100 S.Ct. 2531, 2538, n. 6, 65 L.Ed.2d 597 (1980). Only last year, the United States Supreme Court found that the sexual assault defendant's right to face-to-face confrontation was violated by permitting two 13-year-old girls to testify behind a large screen that enabled Coy to dimly perceive the witnesses but rendered them unable to see him. *Coy v. Iowa*, ___ U.S. ___, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).

State v. Wright, 116 Idaho at 384, 775 P.2d at 1226. Neither a literal nor a functional reading of the Confrontation Clause offers any support for the Idaho court's ruling

that out-of-court statements of an unavailable child sexual abuse victim – which statements are found to be reliable under the residual hearsay exception, Rule 803(24) – are inadmissible unless they meet three novel litmus tests of the Idaho court's own devising.

A. The Literal Wording of the Confrontation Clause Does Not Exclude Reliable Hearsay of Unavailable Witnesses

In *Coy v. Iowa*, 108 S.Ct. 2798 (1988), this Court recently reaffirmed the "literal right to 'confront' the witness at the time of trial" as forming "the core of the values furthered by the Confrontation Clause." *Id.* at 2801 (quoting *California v. Green*, 399 U.S. 149, 157 (1970)). The Court was unsympathetic to the state's argument that "the confrontation interest at stake here was outweighed by the necessity of protecting victims of sexual abuse." *Id.* at 2802. Indeed, for the *Coy* majority, the fact that face-to-face confrontation with the defendant may inflict trauma on the abused child simply illustrates the "truism that constitutional protections have costs." *Id.*

Thus, there is language in *Coy* that may have led the Idaho court to conclude that when the rights of a child victim of sexual abuse conflict with those of a criminal defendant, the Confrontation Clause of the Sixth Amendment to the United States Constitution gives the nod to the latter. But it is a quantum leap from *Coy's* reaffirmation of "the irreducible literal meaning of the clause: 'a right to *meet face to face* all those who appear and give evidence *at trial*,' " *Id.* at 2803 (quoting Harlan, J., concurrence in *California v. Green*, 399 U.S. at 175) (emphasis

added by *Coy* Court), to a ban on the admission of reliable out-of-court statements of those who are unavailable and thus unable to appear and give evidence at trial.

The Idaho court may also have based its ban on the admissibility of the unavailable witness's reliable hearsay statements on the literal language of the Sixth Amendment's Confrontation Clause itself, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . " The potentially misleading nature of this language was noted by Justice Harlan: "Since, however, an extrajudicial declarant is no less a 'witness,' the clause is equally susceptible of being interpreted as a blanket prohibition on the use of any hearsay testimony." *California v. Green*, 399 U.S. at 175. But the literal wording of the Confrontation Clause has never been interpreted by this Court to ban reliable hearsay testimony of persons unavailable at trial. This question was squarely faced in *Mattox v. United States*, 156 U.S. 237 (1895). There the Court acknowledged that admission of dying declarations clearly violated the literal wording of the Sixth Amendment:

> [T]here could be nothing more directly contrary to the letter of the provision in question [the Confrontation Clause] than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury. . . .

Id. at 243 (bracketed material added).

Despite the literal violation, the admissibility of such statements had already been a long-recognized exception to the Confrontation Clause nearly a century ago:

> yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice.

Id.[2] Indeed, as the *Mattox* court noted, such exceptions predate the Constitution itself and are woven into its fabric:

> Many of its [the Constitution's] provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant.

Id. at 243 (bracketed material added).

In *Mattox v. United States*, 146 U.S. 140 (1892), an earlier appeal of the *Mattox* case noted above, this Court

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[2] Similarly, this Court has held: "The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this Court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions." *Salinger v. United States*, 272 U.S. 541, 548 (1926).

held that the dying declaration of a murder victim was properly admitted "upon the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood, and enforce as strict adherence to the truth as the obligation of an oath could impose." *Id.* at 152. Thus, the out-of-court statement of the dying victim was admitted at trial because it met the dual tests of necessity and reliability.

Upon appeal from Mattox's retrial, the Court recognized yet another hearsay exception and upheld the admissibility of testimony of two witnesses from the first trial who had died prior to Mattox's second trial.

> But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to *considerations of public policy and the necessities of the case.* To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

156 U.S. at 243 (emphasis added).

All three opinions of this Court in *Coy v. Iowa* reaffirm the principle that reliable hearsay of an unavailable declarant is admissible when required by "considerations of public policy and the necessities of the case."

The majority opinion in *Coy* noted that prior Court opinions had held – with regard to "the right to exclude

out-of-court statements" – that the "rights conferred by the Confrontation Clause are not absolute and may give way to other important interests." 108 S.Ct. at 2802. This is particularly true with regard to "the right to exclude out-of-court statements." *Id.* (referring to *Ohio v. Roberts*, 448 U.S. 56 (1980)). Similarly, the majority, in a lengthy discussion of Wigmore's views on the Confrontation Clause, referred approvingly to the "sensible and traditional exceptions to the hearsay rule . . . ." *Id.* at 2801-02, n. 2. Finally, though the majority would approve of additional exceptions to the face-to-face requirement of the Confrontation Clause sparingly, it conceded that such exceptions were possible "when necessary to further an important public policy." *Id.* at 2803.

Justice O'Connor's concurrence rejected outright any suggestion that a defendant has an absolute " 'right physically to face those who testify against him,' *ibid.*, even if located at the 'core' of the Confrontation Clause . . . ." *Id.* at 2804 (citing *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)). Instead, the Confrontation Clause only " 'reflects a *preference* for face-to-face confrontation at trial,' " which preference "may be overcome in a particular case if close examination of 'competing interests' so warrants." *Id.* (quoting *Ohio v. Roberts*, 448 U.S. at 63-64) (emphasis in original). In particular, the concurring opinion noted that:

> [v]irtually all of our cases approving the use of hearsay evidence have implicated the literal right to "confront" that has always been recognized as forming "the core of the values furthered by the Confrontation Clause," *California v. Green*, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934-1935, 26 L.Ed.2d 489 (1970), and yet have

> fallen within an exception to the general .requirements of face-to-face confrontation.

Id. at 2804-05. The concurrence noted the Court's traditional recognition that hearsay statements of unavailable witnesses are admissible despite the strict wording of the Confrontation Clause:

> "[A] literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable," but we also acknowledged that "this Court has rejected that view as 'unintended and too extreme.' "

Id. at 2805 (quoting *Bourjaily v. United States*, 483 U.S. 171, 182 (1987)).

Finally, the dissenting opinion of Justice Blackmun in *Coy* pointed to "the exceptions to the rule against hearsay, which allow the admission of out-of-court statements against a defendant." He saw the hearsay exceptions as proof that "the ability of a witness to see the defendant while the witness is testifying does not constitute an essential part of the protections afforded by the Confrontation Clause . . . ." *Id.* at 2807. The dissent argued that "many hearsay statements are made outside the presence of the defendant, and thus implicate the confrontation right asserted here. Yet . . . this interest has not been the focus of this Court's decisions concerning the admissibility of such statements." *Id.* 108 S.Ct. at 2808.

In short, none of the opinions in *Coy* in any way suggest that the Sixth Amendment literal language guaranteeing the accused the right to be "confronted with the witnesses against him" empowers a defendant to bar the

admission of reliable hearsay statements of child sexual abuse victims who are unavailable at trial.[3]

B. A Functional Reading of the Confrontation Clause Does Not Exclude Reliable Hearsay of Unavailable Witnesses

The Confrontation Clause does not dictate only how statements will be made by those who testify at trial. To so limit the clause would focus too narrowly and exclusively on what Justice Brennan has called the "symbolic goals" of the clause. *Lee v. Illinois*, 476 U.S. 530, 540 (1986).[4]

Such a reading of *Coy* would unfairly ignore the "functional" component of the Confrontation Clause, which this Court identifies with the right to cross-examination.

> The right to cross-examination, protected by the Confrontation Clause, thus is essentially a "functional" right designed to promote

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[3] "The language [of the Confrontation Clause] is particularly ill-chosen if what was intended was a prohibition on the use of any hearsay . . . ." *Dutton v. Evans*, 400 U.S. 74, 95 (1970) (Harlan, J. concurring) (bracketed material added).

[4] There is precedent for interpreting the clause in this narrow manner. Justice Harlan "sought to *limit* the clause to a procedural rule partly because no 'linguistic or historical evidence' compelled a broader reading." 102 Harvard L. Rev. 143, 156 (1988) (quoting Harlan, J. concurring in *Dutton v. Evans*, 400 U.S. 74, 95) (emphasis in original).

> reliability in the truth-finding functions of a criminal trial.

Kentucky v. Stincer, 482 U.S. 730, 737 (1987).[5]

If this "functional" or "pragmatic" component of the Confrontation Clause were not recognized, the Clause itself would be trivialized in the protections it provides, and the door would be thrown open to evasion, circumvention and subterfuge:

> [I]nterpreted literally the clause could easily be evaded: instead of calling eyewitnesses to a crime to testify, the state could put on witnesses who would merely recite what those eyewitnesses had told them.

Nelson v. Farrey, 874 F.2d 1222, 1226 (7th Cir. 1989). The result would be "*ex parte* testimony submitted by deposition and affidavit." *California v. Green*, 399 U.S. at 180 (Harlan, J., concurring). This would lead ineluctably to "trial by affidavit," the very "paradigmatic evil the Confrontation Clause was aimed at . . . ." *Dutton v. Evans*, 400 U.S. at 94 (Harlan, J., concurring). This Court has carefully preserved the right to cross-examination as the functional or pragmatic component of the Confrontation Clause, to avoid "a miscarriage of justice, which is to say, the conviction of an innocent person by use of unreliable hearsay." *Nelson v. Farrey*, 874 F.2d at 1228.

At the same time, one cannot lose sight of the fact that the "function" served by recognizing a right to cross-

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[5] "[T]he [confrontation] clause is given a pragmatic rather than a rigid, literal construction." *Barker v. Morris*, 761 F.2d 1396, 1399 (9th Cir. 1985) (Kennedy, J.).

examination as an implied component of the Confrontation Clause is simply "to promote reliability in the truth-finding functions of a criminal trial." *Kentucky v. Stincer*, 482 U.S. at 737. The functional component of the Confrontation Clause has never been interpreted to ban all hearsay, merely such hearsay as is unnecessary or unreliable. "[The Confrontation Clause] countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.' " *Ohio v. Roberts*, 448 U.S. at 65, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934).

The Confrontation Clause, in short, does not guarantee that the declarant of every out-of-court statement admitted at trial must be subjected to cross-examination at trial before the jury. On the contrary,

> the Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. at 20. This limitation is consistent with the concept that the right to confront is a functional one for the purpose of promoting reliability in a criminal trial.

Kentucky v. Stincer, 482 U.S. at 739. An interpretation of the Confrontation Clause's functional component, which guarantees a defendant the right to cross-examine his accuser, so as to ban all reliable hearsay statements of unavailable witnesses would exact too high a price of the truth-finding function. As the Federal Rules of Evidence Advisory Committee stated regarding the admissibility of hearsay statements: "[W]hen the choice is between evidence which is less than best and no evidence at all, only

clear folly would dictate an across-the-board policy of doing without." Advisory Committee's Introductory Note on the Hearsay Problem, quoted in Westen, *The Future of Confrontation*, 77 Mich. L.Rev. 1185, 1193, n. 35 (1979).

This opportunity to cross-examine is satisfied where the witness who hears and testifies to the hearsay is fully available to be cross-examined as to the circumstances under which the hearsay was received. See *Dutton v. Evans*, 400 U.S. 74 (1970) (defendant's ability to cross-examine inmate who overheard co-conspirator blame defendant for murder satisfied requirements of Confrontation Clause); *Tennessee v. Street*, 471 U.S. 409 (1985) (Confrontation Clause's fundamental role in protecting the right of cross-examination satisfied by defendant's ability to freely cross-examine sheriff who read non-hearsay aspects of co-conspirator's confession to the jury).

In the present case, Laura Lee Wright had a full opportunity to cross-examine Dr. Jambura, the pediatrician to whom the younger daughter made the statements incriminating her father and, by implication, her mother. The jury was fully able to discern the circumstances under which the incriminating statements were made and to weigh those statements against the totality of the evidence. Wright's "opportunity for effective cross-examination" of available witnesses was thus satisfied. The Sixth Amendment imposes no additional requirements such as the three rigid litmus tests that the Idaho Supreme Court imposed in this case as conditions precedent to the introduction of child victim hearsay statements.

II.

CONSIDERATIONS OF NECESSITY AND TRUSTWORTHINESS MUST TAKE ACCOUNT OF THE UNIQUE SITUATION OF CHILD SEXUAL ABUSE VICTIMS

Traditionally, this Court has looked to two factors – necessity and trustworthiness – in determining whether a category of hearsay qualifies as an exception to the Confrontation Clause. *Mattox v. United States*, 146 U.S. at 152; *Ohio v. Roberts*, 448 U.S. at 65. These same two factors apply in this case, but each must take account of the unique circumstances of the child sexual abuse victim.

A. Admission of Hearsay Statements of Child Sexual Abuse Victims Is Justified by the Necessities of the Case

In the second *Mattox* appeal, this Court acknowledged that admitting prior testimony of deceased witnesses ran "directly contrary to the letter" of the Confrontation Clause. 156 U.S. at 243. The Court explained that such testimony was "admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, *simply from the necessities of the case*, and to prevent a manifest failure of justice." *Id.* at 244 (emphasis added).

The Court quoted this language approvingly in *Ohio v. Roberts*, where it noted that "competing interests, if 'closely examined,' *Chambers v. Mississippi*, 410 U.S. at 295, may warrant dispensing with confrontation at trial." 448 U.S. at 64. The Court in *Roberts* then elaborated on the first of the two separate ways in which the Confrontation Clause restricts the range of admissible hearsay:

> First, in conformance with the Framers' preference for face-to-face accusation, *the Sixth Amendment establishes a rule of necessity.* In the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.

Id. at 65 (emphasis added).[6]

Justice O'Connor, in her concurrence in *Coy v. Iowa*, recognized that the protection of child sexual abuse victims would justify court procedures other than face-to-face confrontation, thus meeting the "rule of necessity" test laid down in *Roberts*:

> I would permit use of a particular trial procedure that called for something other than face-to-face confrontation *if that procedure was necessary to further an important public policy.* [Citation omitted.] The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy.

108 S.Ct. at 2805 (emphasis added).

The necessity for allowing hearsay statements of child sexual abuse victims springs first from the unique nature of the crime itself. Child abuse, as this Court has

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[6] We need not explore the extent to which this seemingly absolute requirement of demonstrating unavailability may have been modified by the Court's later decision in *United States v. Inadi*, 475 U.S. 387 (1986) (holding that co-conspirator's hearsay statements may be admitted even without a showing of unavailability). It is uncontested in this case that the trial court found the two-and-one-half-year-old daughter incapable of testifying and thus that she was "unavailable" at trial.

noted, "is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. at 60. Compounding the problem is the fact that sex abuse frequently occurs within the home at the hands of a relative or friend. Crimes of sexual abuse are "predominantly nonviolent in nature" and thus "[p]hysical corroboration is rare." Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 Columbia L. Rev. 1745, 1749-50 (1983). The simple fact is that in sex abuse cases the child victim's hearsay statements "often constitute the only proof of the crime." *Id.* at 1749. To exclude such statements merely because they have not been given in court would cripple the judicial process.

The unique nature of the child sex abuse victim provides a second ground of necessity for admitting out-of-court statements. The child, as the trial court found in the present case, may be so young as to be testimonially incompetent, under Rule 601.[7] Although the child may know the difference between the truth and a lie, and may be able to communicate on a one-to-one basis and to recall events accurately, she may be totally unable to communicate when placed in the trial setting.

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[7] Idaho Rule of Evidence 601 differs from Federal Rule of Evidence 601 in that the Idaho Rule provides a specific test for competency ("Person whom the court finds to be incapable of receiving impressions of the facts respecting which they are examined, or of relating them truly.") while the Federal Rule is more general ("Every person is competent to be a witness except as otherwise provided in these rules.") and references state law when a state claim or defense is at issue.

In these and similar instances, the child's prior out-of-court statements will have some of the same qualities as those of the co-conspirator discussed in *United States v. Inadi*, 475 U.S. 387, 395-96 (1986). Like the co-conspirator's statement in *Inadi*, the out-of-court statements of a child sexual abuse victim are not simply "a weaker substitute for live testimony" such that "there is little justification for relying on the weaker version." 475 U.S. at 394. Like the co-conspirator's earlier statement, the child victim's earlier out-of-court statement to parents, relatives, school counselors, pediatricians, psychologists and others "has independent evidentiary significance of its own . . . " *Id.*, and oftentimes "cannot be replicated, even if the declarant testifies to the same matters in court." *Id.* at 395. Statements made by very young child victims in a relaxed setting to a trusted adult "are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence." *Id.* at 396.

Nothing would be gained and much would be lost to the truth-finding function if statements by extremely young or traumatized victims were held inadmissible simply because the child was not available for cross-examination at trial. Where sufficient indicia of reliability of the out-of-court statement are established, Judge Posner's words apply:

> [W]e should not allow labels and lawyers' pieties to delude us into believing that cross-examination of a four-year-old child concerning sexual abuse by her father a year earlier is a more effective method of discovering the truth than listening to and weighing the testimony of a competent psychologist who interviewed the child over a period of many months in a setting designed to elicit truthful communication.

Nelson v. Farrey, 874 F.2d at 1230. A rule that would deprive the trier of fact of statements that are "usually irreplaceable as substantive evidence" would reward those who prey upon the youngest, most vulnerable and most dependent victims of society. Such a rule would be intolerable.

The necessity for admitting hearsay statements of abused children draws a final justification from the unique need, in child sex abuse cases, to "protect victims from being abused a second time by the criminal justice system." 102 Harvard L. Rev., *supra* at 151.[8] This Court has long recognized the necessity for admitting hearsay of an absent declarant if the accused himself is responsible for the declarant's absence.

> The Constitution does not guaranty an accused person against the legitimate consequences of his own wrongful acts. It grants him the *privilege* of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

Reynolds v. United States, 98 U.S. 145, 158 (1878) (emphasis in original). The child who has been so traumatized that

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[8] *See* Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 Criminal Justice Journal 1 (1983); Note: *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harvard L. Rev. at 806, 807, n.12 (1985).

he or she cannot appear in court and face the defendant is like the witness who has been killed or otherwise kept away from the trial by the defendant's own wrongdoing. In such circumstances, the child's out-of-court statements are admissible:

> The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong. . . . It is the outgrowth of a maxim based on the principles of common honesty, and, if properly administered, can harm no one.

Id. at 159. A contrary rule, one that would ban reliable hearsay statements of child sexual abuse victims who have been successfully traumatized into silence or paralysis, would be intolerable: "If such evidence were never admissible, molesters of small children, especially incestuous molesters, would rarely be punished." *Nelson v. Farrey*, 874 F.2d at 1229. "[H]ow ironic it would be if the child molester could use the trauma inflicted on his own victim as the fulcrum for levering his way to freedom." *Id.* at 1230. Such a spectre recalls Justice Cardozo's famous warning in *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 122 (1934): "There is danger that the criminal law will be brought into contempt – that discredit will even touch the great immunities asserted by the Fourteenth Amendment – if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

Justice O'Connor, in her concurrence in *Coy v. Iowa*, predicted that the primary focus on Confrontation Clause exceptions fashioned to protect young sex abuse victims "will be on the necessity prong." 108 S.Ct. at 2805. When,

as in the present case, the trial court makes a specific finding that the child victim is unavailable at trial, surely the necessity prong has been met and the child's reliable hearsay statements should be admissible. In such cases "the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses." *Id.*

B. The Out-of-Court Statements of Unavailable Child Sexual Abuse Victims Are Admissible if Established as Reliable

Once a finding of unavailability is made, the prosecution must establish the trustworthiness of the statement in order to be excepted from the Sixth Amendment's requirement of face-to-face confrontation. Hearsay statements, as this Court has repeatedly noted, meet the test of trustworthiness and are admissible only if they bear adequate "indicia of reliability":

> The focus of the Court's concern has been to insure that there "are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant," *Dutton v. Evans, supra*, at 89, and to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement," *California v. Green, supra*, at 161.

Mancusi v. Stubbs, 408 U.S. 204, 213 (1972). The "indicia of reliability" test can be met in either of two ways:

> Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a

showing of particularized guarantees of trustworthiness.

Ohio v. Roberts, 448 U.S. at 66.

1. The Firmly Rooted Hearsay Exceptions Often Function to Exclude Reliable Hearsay Testimony of the Unavailable Child Sexual Abuse Victim

Until recently, prosecutors have attempted to introduce child victim hearsay statements under one of the "firmly rooted" hearsay exceptions found in Rule 803(1)-(23) of the state and federal rules of evidence. The attempt is fraught with uncertainty and frustration.

Most frequently, statements were proffered under the "excited utterance" exception of Rule 803(2). This exception, however, often proved a poor fit. The child victim may not display the shock or trauma that adults expect, *Brown v. United States*, 152 F.2d 138 (D.C. Cir. 1945); or the child may not report the incident immediately, *Fitzgerald v. United States*, 443 A.2d 1295 (D.C. 1982). Strict application of the excited utterance rule will serve to exclude such out-of-court statements. Unfortunately, the empirical evidence suggests that children, especially victims of incest, frequently experience little shock from the sexual molestation by a loved one and may allow many years to elapse before reporting an incestuous relationship or incident. 83 Columbia Law Rev. at 1757.

Similarly, the attempt to admit child hearsay statements under the medical treatment exception, Rule 803(4), sometimes runs into problems if the child is too young to understand the doctor-patient relationship or if

the interview is conducted by a family pediatrician outside the normal doctor-patient relationship or setting. Unless the court is willing to stretch the usual ground-rules for the medical exception, the hearsay may prove inadmissible.[9]

The use of the "firmly rooted hearsay exceptions," in short, often stretches the exceptions beyond their traditional bounds. When this occurs, strictly speaking, the exceptions no longer have the character of "a firmly rooted hearsay exception." The result in many instances is the rejection of obviously probative out-of-court statements. The result in all instances is intolerable uncertainty.[10]

The basic problem is that the traditional, "firmly rooted" hearsay exceptions rely on particular indicators of trustworthiness, e.g., shock, trauma, excitement, spontaneity, or narration to an acknowledged professional.

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[9] Note, *State v. Smith: Facilitating the Admissibility of Hearsay Statements in Child Sexual Abuse Cases*, 64 N.C.L. Rev. 1352 (1986); Note, *Evidence – Hearsay Child Abuse and Neglect – A Child's Statements Naming an Abuser Are Admissible Under the Medical Diagnosis or Treatment Exception to the Hearsay Rule – Goldade v. State*, 674 P.2d 721 (Wyo. 1983), 563 U. of Cinn. L. Rev. 1155 (1984); Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C.L. Rev. 257 (1989).

[10] "Courts have thus tended to stretch existing hearsay exceptions to accommodate a child victim's out-of-court statements because they are deemed uniquely necessary and trustworthy. The problem with 'stretching' the existing exceptions in this manner is the destruction of the certainty and integrity of the exceptions." *State v. Myatt*, 697 P.2d 836, 842 (Kan. 1985).

This reliance on traditional criteria of adult trustworthiness results in the exclusion of other indicia of reliability more appropriate to children. *Id.* at 1756.

2. The Totality of the Circumstances Must be Evaluated to Determine Whether "Particularized Guarantees of Trustworthiness" Exist

In the present case, the trial court found sufficient "circumstantial guarantees of trustworthiness" to admit the out-of-court statements of the two-and-one-half-year-old victim under Rule 803(24). Although the court did not apply Idaho's child victim hearsay statute, Idaho Code § 19-3024,[11] the state submits the statements would have met the equivalent "indicia of reliability" test of the statute as well. While accepting this finding of the trial court regarding the reliability of the identical hearsay testimony for Rule 803(24) purposes,[12] the Idaho Supreme Court nonetheless found the testimony insufficiently reliable for Confrontation Clause purposes.

In *Ohio v. Roberts* the Court did not explain in detail how a non-firmly-rooted hearsay exception should be evaluated to determine whether sufficient "particularized guarantees of trustworthiness" existed to pass muster

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[11] The Idaho Supreme Court has ruled that matters of procedure are to be controlled by rules of the court, not by statutory enactments of the legislature. *State v. Currington*, 108 Idaho 539, 700 P.2d 942 (1985).

[12] In the companion case of *State v. Giles*, 115 Idaho 984, 772 P.2d 191 (1989), the Idaho Supreme Court affirmed Giles' conviction, holding that the identical hearsay statement was properly admitted pursuant to Rule 803(24).

under the Confrontation Clause. Guidance on this issue was provided most recently in *Bourjaily v. United States*, where the Court explored the limits the Confrontation Clause places on the admissibility of the out-of-court statement of a co-conspirator. While the context in *Bourjaily* was Rule 801(d)(2)(E), found to be a firmly rooted hearsay exception, the Court's analysis applies equally well in determining whether statements proffered under the residual hearsay exception, Rule 803(24), or under contemporary child victim hearsay statutes and rules, bear "particularized guarantees of trustworthiness." As explained by the Court:

> Petitioner's theory ignores two simple facts of evidentiary life. First, out-of-court statements are only *presumed* unreliable. The presumption may be rebutted by appropriate proof. . . . Second, *individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.* Taken together, these two propositions demonstrate that *a piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence.*

483 U.S. at 179-180 (emphasis added).

The State of Idaho suggests, in light of the principles spelled out in *Roberts* and *Bourjaily*, that the proper approach in evaluating whether sufficient "particularized guarantees of reliability" exist to comply with the Confrontation Clause is to review on a case-by-case basis the

totality of the circumstances[13] surrounding the alleged sexual abuse and the making of the statement.

An initial, though partial, listing of the circumstances that a trial court should consider in determining the reliability of a hearsay statement was provided by this Court two decades ago in *Dutton v. Evans,* where the plurality considered several factors in evaluating the reliability of a hearsay statement of a co-defendant: the declarant's personal knowledge about the identity and role of the individuals involved in the crime was abundantly clear; the possibility that the statement was founded upon faulty recollection was remote; and the circumstances under which the statement was made (its spontaneity and the fact that it was against declarant's penal interest) gave reason to suppose that the declarant did not misrepresent the defendant's involvement in the crime. 400 U.S. at 88-89.

Other particularized guarantees of trustworthiness, more closely tailored to the unique circumstances of the child sexual abuse victim, were enunciated by the Eighth Circuit Court of Appeals in *United States v. Dorian,* 803 F.2d 1439 (8th Cir. 1986). That case concerned the hearsay statements of a five-year-old to her foster mother regarding sexual abuse by her father. The girl was called to the stand at trial, "but because of her age and obvious fright, she was unable to testify meaningfully." 803 F.2d at 1443.

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[13] The North Carolina Supreme Court appears to have first applied the phrase "totality of the circumstances" to this context. See *State v. Deanes,* 374 S.E.2d 249, 256-57 (1988), *cert. denied,* 109 S.Ct. 2455 (1989).

The trial court permitted the foster mother to testify to the child's out-of-court statements.

The Eighth Circuit, after reviewing the record, held that the following factors made the hearsay admissible: the interviewers, including the child's foster mother, asserted they were careful not to use leading or suggestive questions; the child revealed the molestation only by stages, which an expert affirmed was typical of child sex abuse victims; the girl's description of the incident was "graphic but child-like" with a distinct "ring of veracity" (he "put his boy thing in the hole between my legs"); and her description of an erect penis was not normally a matter within the knowledge of a five-year-old girl. *Id.* at 1444-45. The Eighth Circuit further noted that the child's statement was corroborated by other evidence:

> the descriptions of her fearful behavior around men; her terror when the physician's assistant prepared to conduct a vaginal examination; her disturbed behavior when told she was going home, which stopped when she learned her father would not be there; . . .

Id. at 1445. Finally, the court observed that "the medical evidence, although inconclusive, was certainly consistent with sexual abuse." *Id.* The court concluded that the child victim's hearsay statements were admissible under both the residual exception, Rule 803(24), and the Confrontation Clause of the Sixth Amendment. Other federal courts have likewise upheld the admission of out-of-court statements made by child victims of sex abuse. *Accord Nelson v. Farrey; United States v. St. John,* 851 F.2d 1096, 1098 (8th Cir. 1988); *Morgan v. Foretich,* 846 F.2d 941, 946 (4th Cir. 1988); *United States v. Cree,* 778 F.2d 474, 477-78 (8th Cir.

1985); *United States v. Nick*, 604 F.2d 1199, 1204 (9th Cir. 1979).

The Montana Supreme Court promulgated its own "Child Hearsay Guidelines" in the course of its opinion in *State v. J.C.E.*, 767 P.2d 309 (Mont. 1988). While the context was that of the residual hearsay exception for unavailable witnesses, Rule 804(b)(5), the factors listed provide a systematic approach for a trial court to follow in determining whether the unavailable child victim's out-of-court statement meets the "particularized guarantees of trustworthiness" test of the Confrontation Clause. The Montana court prescribed twenty different factors the trial court might weigh in five different categories: (1) the attributes of the child hearsay declarant; (2) the witness relating the hearsay statement; (3) the statement itself; (4) the availability of corroborative evidence; and (5) other considerations. 767 P.2d at 315-316. *See also State v. Sorenson*, 421 N.W.2d 77, 84-85 (Wis. 1988) (factors to be weighed include the attributes of the child making the statement; the person to whom the statement was made; the circumstances under which the statement was made; the content of the statement itself; and other corroborating evidence).[14]

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[14] More than half of the states now provide for a child sexual abuse hearsay exception either by statute or by court rule:

Alaska Stat. § 12.40.110 (1985); Ariz. Rev. Stat. Ann. 13-1416 (Supp. 1987); Ark. R. Evid. 803(25)(A); Cal. Evid. Code § 1228 (West. 1985); Colo. Rev. Stat. 13-25-129 (1987); Fla. Stat. § 90.803(23) (Supp. 1988); Georgia Evidence Code § 24-3-16 (1986); Idaho Code § 19-3024 (1987); Ill. Ann. Stat. ch. 38, para.

(Continued on following page)

A caveat is in order. The goal is to consider the totality of the circumstances, not to substitute a new mandatory checklist, no matter how comprehensive. *State v. J.C.E.*, 767 P.2d at 315. The reliability factors "are not to be considered exhaustive, nor are all factors required to be present in order to admit the declarations." *United States v. Fleishman*, 684 F.2d 1329, 1339 (9th Cir.), *cert. denied*, 459 U.S. 1044 (1982). Or, as Judge Kennedy stated, in considering the admissibility of videotaped hearsay statements of a deceased declarant:

> There is no mechanical test for determining the reliability of out-of-court statements. (Citation omitted.) Each case must be evaluated on its own facts. (Citations omitted.) The inquiry in each case must reflect "a practical concern for the truth-determining process."

Barker v. Morris, 761 F.2d at 1400.

(Continued from previous page)

115-10 (Smith-Hurd 1984); Ind. Code Ann. § 35-37-4-6 (Burns 1985); Iowa Code § 232.96(6) (1985); Kan. Stat. Ann. 60-460(dd) (1983); Ky. Rev. Stat. Ann. 421.355 (Michie/Bobbs-Merrill 1988 Cum.Supp.); Me. Rev. Stat. Ann. tit. 15, § 1205 (1989 Cum.Supp.); Md. Cts. & Jud. Proc. Code Ann. § 9-103.1 (1988 Cum. Supp.); Minn. Stat. Ann. § 595.02(3) (West 1988); Miss. Code Ann. § 13-1-403 (1989 Cum.Supp.); Mo. Rev. Stat. § 491.075 (1985); Nev. Rev. Stat. § 51.385 (1987); N.J. Rule 63(33), N.J. Rules of Evidence (1989); N.D. Rule 803(25), N.D. Rules of Evidence (1990); Okla. Stat. Ann. tit. 12, § 2803.1 (West Supp. 1987); 42 Pa. Cons. Stat. § 5985.1; (Act 100-89); S.D. Codified Laws Ann. § 19-16-38 (1987); Tex. Crim. Proc. Code Ann. § 38.072 (Vernon 1985); Utah Code Ann. § 76-5-411 (1985); Vt. R. Evid. 804a (Supp. 1988); Wash. Rev. Code Ann. § 9A.44.120 (1988).

> The test, however, is whether the factors surrounding the making of the out-of-court statement, taken as a whole, indicate trustworthiness, not whether some mechanical list of factors indicating reliability is met.

Id. at 1403.

In the final analysis, it is only a totality of the circumstances approach that complies with this Court's requirement that out-of-court statements – whether they are proffered under the residual hearsay exception or the new child sex abuse victim hearsay statutes and rules – must show "particularized guarantees of trustworthiness" to be admissible pursuant to the requirements of the Confrontation Clause of the Sixth Amendment. A mechanical list, by its very nature, will always cast a net that is too narrow or too wide, either excluding testimony that is essential to the criminal justice truth-seeking process and to the protection of society's most innocent victims, or trampling upon the constitutional rights of the criminal defendant.

3. The Totality of the Circumstances Test Should Be Applied for Purposes of Both the Residual Hearsay Exception and the Confrontation Clause

The Court should make it clear in this case that when a trial court applies a totality of the circumstances test – such as that generally mandated in state courts under the residual hearsay exceptions of Rule 803(24) and 804(b)(5), and under many of the newly enacted child sex abuse victim hearsay statutes or rules of evidence – and finds

that circumstantial guarantees of trustworthiness do exist, nothing more is required to demonstrate that the statements pass constitutional muster under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

There are persuasive reasons for holding that the test for hearsay statements under Rule 803(24) is identical to that under the Confrontation Clause. First, the structure of the two tests is almost identical. The rules of evidence first list 23 traditional hearsay exceptions and then recognize a residual category of exceptions when it manifests "circumstantial guarantees of trustworthiness" equivalent to the prior 23. Similarly, the Roberts two-prong constitutional test first establishes "firmly rooted" hearsay exceptions (presumably those recognized for many years), and then a residual category for those manifesting "particularized guarantees of trustworthiness."

Second, because the language of the residual hearsay exception ("equivalent circumstantial guarantees of trustworthiness") is virtually identical to that of the second prong of the Confrontation Clause test ("particularized guarantees of trustworthiness"), any attempt to distinguish them will create a distinction without a difference. State courts that have attempted to unravel this problem have, with the exception of the Idaho Supreme Court, concluded that the two standards are indistinguishable. *See State v. Robinson*, 735 P.2d 801 (Ariz. 1987); *Perez v. State*, 536 So.2d 206 (Fla. 1988), *reh'g denied*, 1989, *cert. den.*, 109 S.Ct. 3253 (1989); *State v. Myatt*, 697 P.2d 836 (Kan. 1985).

Third, there is sound precedent for finding congruence between the admissibility tests of the rules of evidence and those of the Confrontation Clause. In *Bourjaily v. United States*, 483 U.S. 171 (1987), this Court affirmed a decision of the Court of Appeals that "the requirements of admission under Rule 801(d)(2)(E) are identical to the requirements of the Confrontation Clause, and since the statements were admissible under the Rule, there was no constitutional problem." 483 U.S. at 182. While the Court based its conclusion on the fact that the co-conspirator exception was "firmly rooted," it took pains to stress that the " 'hearsay rules and the Confrontation Clause are generally designed to protect similar values,' *California v. Green*, 399 U.S. 149, 155, and 'stem from the same roots,' *Dutton v. Evans*, 400 U.S. 74, 86 . . . " 483 U.S. at 182-183. Thus, compliance with a test elaborated over generations in one context should suffice to meet the test elaborated in the other.

Finally, sound policy demands that trial judges who admit out-of-court statements as meeting the test of the residual hearsay exception rule should not be blindsided by additional amorphous Confrontation Clause tests devised by reviewing courts. A holding to this effect will not lead to the "constitutionalization of hearsay rules" throughout the federal and state courts. *California v. Green*, 399 U.S. at 184 (Harlan, J., concurring).

Until this Court rules that the Confrontation Clause requirement of "particularized guarantees of trustworthiness" is met by fulfilling Rule 803(24)'s requirement of "equivalent circumstantial guarantees of trustworthiness," the Confrontation Clause will function as it did in

the present cases, as a trap for the unwary. Most importantly, until the Court clarifies this issue the promise of *Roberts* – to provide "certainty in the workaday world of conducting criminal trials," 448 U.S. at 66 – will remain unfulfilled.

4. The Idaho Supreme Court Erred in Creating Three Conditions Precedent to the Admission of Child Victim Hearsay Statements

The Idaho Supreme Court, in the companion case of *State v. Giles*, held that the hearsay statements of the two-and-one-half-year-old child sexual abuse victim to her examining pediatrician had "circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions," and thus were admissible under the residual hearsay exception, Rule 803(24). 772 P.2d at 195. In the present case, however, the Idaho court held that the same statements were "fraught with the dangers of unreliability which the Confrontation Clause is designed to highlight and obviate" and were therefore inadmissible under the Confrontation Clause of the Sixth Amendment to the United States Constitution. 775 P.2d at 1231. The Idaho Supreme Court held that to pass constitutional muster the prosecution must establish that (1) the interview was either audio or videotaped; (2) leading questions were not used; and (3) the examining pediatrician conducting the interview did not have any preconceived idea of what the child should be disclosing.

These three criteria are not so much tests as they are inflexible obstacles. As such, they are at odds with, and frustrate, this Court's directive that hearsay statements of

an unavailable witness are admissible under the Confrontation Clause if the proponent establishes that "particularized guarantees of trustworthiness" exist, *Ohio v. Roberts*, 448 U.S. at 66. Any mechanical "test" violates this standard because it cuts off inquiry into the totality of circumstances that may provide "indicia of reliability." *Id.* The result is that reliable hearsay statements will be excluded and the trier of fact will be denied "a satisfactory basis for evaluating the truth of the prior statement." *California v. Green*, 399 U.S. at 161. The truth-seeking process is inevitably compromised. The three tests announced by the Idaho Supreme Court in this case are particularly unfortunate.

The suggestion that all interviews containing potential hearsay evidentiary statements should be audio or videotaped is not novel.[15] The defendant in *Nelson v. Farrey* made the same suggestion. Judge Posner rejected it on sound practical considerations: the clinical psychologist did not know at the outset that a revelation would be made leading to a criminal prosecution and thus would not have known he should be videotaping; clients would be rightly outraged if the psychologist routinely taped all interviews in the event that revelations of sexual misconduct might occur; and the videotape would either have to run many hours in order to record every interview session (which would be "unbearably diffuse and tedious"),

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[15] This requirement is not, properly speaking, one of the indicia of reliability. Rather, its aim is to tip the scales to the criminal defendant by requiring contemporaneous recording of all potentially inculpatory hearsay statements for his "preservation and perusal at or before trial." *State v. Wright*, 778 P.2d at 1227.

or be edited (which would "tend to magnify the impact of [the victim's] statements about sexual abuse"). 874 F.2d at 1229 (bracketed material added). To these objections might be added the fact that not all psychologists, sociologists, school counselors, pediatricians, and other interviewers have videotaping equipment readily available and unobtrusively situated so as not to draw attention to itself. In impoverished, rural parts of the country the creation of videotaping as a constitutional *sine qua non* would simply work to exclude almost all hearsay statements of child sexual abuse victims.

The Idaho court's second condition precedent to admissibility – that no leading questions be used in interviewing the child sexual abuse victim – is also inappropriate. Leading and suggestive questions, to be sure, are generally frowned upon. Nonetheless, as Professor Myers states in his amicus brief in this case, such questions do not necessarily undermine the reliability of children's hearsay statements and, in fact, may be necessary in some circumstances to elicit reliable information. This is particularly true in the case of very young children.

Professor Myers notes that the legal system itself already recognizes the need and permissibility for leading questions in the case of "the child witness or the adult with communication problems. . . ." Federal Rules of Evidence 611(c), Notes of Advisory Committee on Rules. The federal appellate courts approve the use of leading questions during direct examination of children who are reluctant to testify. *See United States v. Rossbach*, 701 F.2d

713, 718 (8th Cir. 1983); *United States v. Iron Shell*, 633 F.2d 77, 92 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).

The Idaho Supreme Court's final test – that the pediatrician should have had no preconceived idea of what the child should be disclosing – is not only inappropriate but flies in the face of the fundamental workings of human intelligence. A doctor whose inquiry into symptoms is not guided by preconceived theories and hypotheses is simply untrained and incompetent. Listen to America's foremost educational theorist as he describes the process:

> A physician, for example, is called by a patient. . . . [This] sets the problem of inquiry. Certain clinical operations are performed, sounding, tapping, getting registrations of pulse, temperature, respiration, etc. These constitute the symptoms; they supply the evidence to be interpreted. . . . The observations mean something not in and of themselves, but are given meaning in the light of the systematized knowledge of medicine as far as that is at the command of the practitioner. He calls upon his store of knowledge to suggest ideas that may aid him in reaching a judgment as to the nature of the trouble and its proper treatment.

John Dewey, *The Quest for Certainty*, 174 (Capricorn Books 1960). The notion that a doctor, or any other qualified professional, would ever perform an interview without preconceived ideas as to what the patient will be disclosing is not only impractical; it is both undesirable and unattainable in the real world of human inquiry.

5. The State Established That the Statements of the Two- and-one-half-year-old Victim Made to Dr. Jambura Contained Sufficient "Particularized Guarantees of Trustworthiness" to Comply with the Requirements of the Confrontation Clause

The trial court found that the statements made by the two-and-one-half-year-old daughter to Dr. Jambura were sufficiently reliable to comply with the requirements of the Confrontation Clause. J.A.119-120. The court explained that (1) there was physical evidence to corroborate that sexual abuse occurred; (2) there was no motive for the two-and-one-half-year-old younger daughter "to make up a story of this nature;" (3) "the nature of the statements themselves as to the sexual abuse are such that they fall outside the general believability that a child could make them up or would make them up;" (4) the younger daughter was in the custody of the defendants at the time the injuries occurred; (5) the older daughter testified that it was the younger daughter's mother and father who were the perpetrators of this sexual abuse; and (6) the perpetrators were well known to the victim. J.A.115. The trial court concluded that the younger daughter's statements to Dr. Jambura were admissible under Rule 803(24) because their "circumstantial guarantees of trustworthiness" were equivalent to statements permitted under some of the firmly rooted hearsay exceptions. J.A.119

In the companion case of *State v. Giles* the Idaho Supreme Court evaluated the hearsay statements of the

two-and-one-half-year-old younger daughter and affirmed the trial court's determination that they "had circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions," which justified their admission pursuant to Rule 803(24). 772 P.2d at 195. In *Giles* the court discussed what factors could appropriately be considered in assessing the reliability of the hearsay:

> As indicia of unreliability, appellant cites the alleged suggestiveness of Dr. Jambura's questions (by referring to 'daddy') and the younger daughter's alleged inability to recollect and communicate because of her age. Appellant attempts to distinguish between indicia of reliability and corroborative evidence, and suggests that the latter should not be considered in an I.R.E. 803(24) analysis. . . . The analysis required by I.R.E. 803(24) and *Hester* contemplates that *the trial court will look to all the other evidence to determine whether it tends to corroborate the hearsay statement,* before the trial court concludes that the hearsay statement has the same circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions.

Id. at 194 (emphasis added).

The three-member majority of the Idaho Supreme Court, in *State v. Wright,* did not address the trial court's analysis and finding that the statements of the younger daughter to Dr. Jambura had circumstantial guarantees of trustworthiness. Nor did the majority address its own holding in Giles just three months earlier that consideration of all the circumstances, including corroborative evidence, was appropriate in evaluating the reliability of the hearsay in question. Instead, the *Wright* court explained:

> We fail to see how Wright's right to face-to-face confrontation escaped violation in this event of admission of inculpatory hearsay testimony which did not fall within any of the traditional exceptions and which was brought into evidence as a result of an interview lacking procedural safeguards. The record does not provide the required showing of particularized guarantees of trustworthiness supporting the doctor's statement of the young girl's declarations. Instead, the hearsay declarations of the younger Wright girl are not trustworthy because of Dr. Jambura's interview technique: *the questions and answers were not recorded on videotape for preservation and perusal by the defense at or before trial; and blatantly leading questions were used in the interrogation.* Further, the statements lack trustworthiness because *this interrogation was performed by someone with a preconceived idea of what the child should be disclosing.* Because of the combined effect of her tender years and the suggestive, inadequately reviewable interview technique applied by Dr. Jambura, we conclude that Dr. Jambura's testimony regarding the younger Wright girl's declarations lacked the particularized guarantees of trustworthiness necessary to satisfy the requirements of the Confrontation Clause.

775 P.2d at 1227 (emphasis added).

The Idaho Supreme Court in the case at hand looked for the particularized guarantees of trustworthiness required by the Confrontation Clause only in the actual making of the statement. It did not, as many courts have done and as the Idaho Supreme Court itself did in *Giles* just three months earlier, look to all the circumstances surrounding the making of the hearsay statement, including corroborative evidence.

By contrast, the trial court did look to the totality of circumstances surrounding the making of the statement as well as the alleged abuse. In so doing, the court correctly held that the statements of the younger daughter to Dr. Jambura contained sufficient "indicia of reliability" and "circumstantial guarantees of trustworthiness" to admit them without impinging on the protections guaranteed to Laura Lee Wright by the Confrontation Clause of the Sixth Amendment. J.A.115, 119.

CONCLUSION

The out-of-court statements of the two-and-one-half-year-old sexual abuse victim who was unavailable to testify at trial in this case were reliable and therefore admissible. The constitutional admissibility of such statements should be determined by considering the totality of the circumstances surrounding the statement and the alleged sexual abuse. This test provides predictability in determining whether the statement manifests sufficient indicia of reliability to be admissible at trial. Any other test threatens to exclude reliable statements that otherwise demonstrate particularized guarantees of trustworthiness. The Idaho Supreme Court erred in creating three conditions precedent for the admissibility of statements of unavailable child sexual abuse victims. Neither the literal nor the functional reading of the Confrontation Clause imposes such conditions on otherwise reliable hearsay of an unavailable child sexual abuse victim.

The State of Idaho respectfully requests this Court to reverse the judgment of the Idaho Supreme Court.

JAMES T. JONES
Attorney General of the State of Idaho

JOHN J. MCMAHON
Chief Deputy
Attorney General

*MYRNA A. I. STAHMAN
Deputy Attorney General
Statehouse, Room 210
Boise, Idaho 83720
Telephone: (208) 334-2400

Counsel for Petitioner

*Counsel of Record